No. 255

IN THE

Supreme Court of the United States

October Term, 1948

255

GERHART EISLER, *Petitioner*,

v.

THE UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Court of Appeals
For the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER

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I. THE COMMITTEE ON UN-AMERICAN ACTIVITIES COULD NOT VALIDLY COMPEL PETITIONER TO TESTIFY, NOR CAN PETITIONER BE PUNISHED FOR WITHHOLDING TESTIMONY.

A. The Nature of the Constitutional Issue.

"The sole constitutional issue," the government's brief states (at p. 24), "is whether the Committee can lawfully ask any question." This statement is, of course, inartistic.

The issue is not whether the Committee can lawfully ask any question, but whether the Committee can lawfully make anybody answer any question which it might ask within its expressed authority, and whether one who refuses to answer any such questions it might ask (or what is the same thing, refuses to appear in response to a subpoena) can lawfully be punished for his refusal.

But the issue, which is whether Congress can require anyone to answer any question *of this Committee*, is not resolved, as the government believes, by a demonstration that the Committee can, within its expressed authority, ask questions the answering of which *to some committee* Congress can require. We assert that the authorization given to this Committee on its face infringes the freedoms protected by the Bill of Rights. If we are correct, it follows, as we later demonstrate, that Congress cannot validly utilize *the very same authorization* even in an application which does not infringe those freedoms.

To put the matter in the concrete. Suppose Congress created a committee which it expressly authorized to determine which doctrines were, in the opinions of the members of the committee, "false," "dangerous" and "distasteful." Suppose it expressly provided that this committee should be responsible for censoring the expression of such doctrines by seeing to it that those who advocate or listen to such doctrines (not to mention those who associate with any such advocates or listeners) should be publicly labelled as enemies of the State, exposed to public odium, and blacklisted for public and private employment. Suppose it gave this committee power to compel testimony in aid of its censorship jurisdiction. Surely even the Department of Justice would concede that the authority of such a committee was constitutionally invalid and that its summons could be ignored with impunity. Yet it is plain that such a committee could, within its expressed jurisdiction, ask all kinds of questions the answers to which Congress

could constitutionally compel if asked by a valid committee. It is plain that this hypothetical committee could even make the very inquiries the possibility of which, the government's brief thinks (at pp. 24, 32, 33), save the validity of the Committee on Un-American Activities. It is even plain that our hypothetical committee could, within its expressed jurisdiction, exercise a censorship which Congress could constitutionally impose—as by censoring obscene matter passing through the mails or in interstate commerce. Nevertheless, the hypothetical committee is invalid as a whole. It follows that the test of whether a committee can ask some "proper" questions is not the test of constitutionality of its authorization, since it does not work. Indeed, any lively imagination can always suppose some "proper" question within any conceivable committee authorization. Nor can it be supposed that this committee can be validated merely by Congress' adding to its authorization a clause that it can investigate "all other questions relative thereto that would aid Congress in any necessary remedial legislation."

In our principal brief, what we demonstrated, and what the government's brief never actually contradicts, is that the Committee on Un-American Activities is this no-longer-hypothetical committee. We demonstrated that an analysis of the terms of the Committee's authorization shows that it is inevitably a censor, and one without restriction. We also demonstrated that the legislative debates, the Committee's own interpretations of its authority, the Committee's actions, and the Committee's pernicious effect on our democracy, all support this analysis.

Since such was the obvious and avowed purpose of our analysis of the Committee's authorization, reports and acts, the government might have spared us the platitudes (its brief, p. 25) that a committee is not invalid merely because it frequently misbehaves. Since we expressly disclaimed (our brief, p. 33), any suggestion that the Committee was

invalid merely because it had misused its powers, the government might have dispensed with arguing that "a possible—or a past—misuse of a power lawfully granted does not warrant a denial of the power's existence" (government brief, p. 25). Our point has always been that the Committee has no "power lawfully granted." And the remedy for this, like the remedy for other unconstitutional legislation, lies with the courts and not, as the government suggests, merely with the constituents of the offending Congressmen. We had supposed that one of the functions of the judiciary, under our system of checks and balances, was to protect a person from unconstitutional legislation even when the Congressmen who passed it are sufficiently popular with their constituents so as to be returned to office despite, or sometimes because of, their support of that legislation.

B. The Petitioner Has Standing to Raise the Constitutional Issue.

The issue here, then, is whether the Committee can constitutionally require an answer to *any* question it might ask. The presence of this issue obviously does not depend on whether or not the Committee in fact asked particular questions, and therefore petitioner's standing to raise the issue is not affected by the fact that no questions were asked. There is no sense to the government's suggestion (its brief, pp. 26, 27) that a witness must wait to be asked a question (perhaps, "What is your name?") before he can challenge the Committee's authority to require him to answer *any* question. It is enough that the Committee summoned petitioner, which means that it asserted the right to ask him some questions. Petitioner's contention is that the Committee could not lawfully require him to answer any question it might ask, including questions which Congress could require him to answer to some other agency or kind of agency. Whether or not this contention is correct is a different matter than whether the petitioner

has standing to make it. As we pointed out in our principal brief (p. 11), one who ignores a summons has always been able to urge that the authority to summon is invalid—i. e., that the summoning authority may not require him to answer any question it might ask within its expressed authorization.

The only basis on which this contention could not be considered would be if this Court should hold that the scope of its judicial review extends not to the validity of the Committee's power to compel any testimony but only to the constitutional propriety of particular questions it asks. Such a limitation of review is inconsistent with the numerous decisions of this Court which have ruled that the investigative jurisdiction of a committee as a whole, as well as particular questions asked by the committee, can be reviewed for constitutionality. *McGrain v. Daugherty*, 273 U. S. 135; *Sinclair v. United States*, 279 U. S. 263; *Kilbourn v. Thompson*, 103 U. S. 168; *Re Chapman*, 166 U. S. 661. So in *Daugherty's* case, the witness had failed to appear in response to a committee summons, and the Court recognized that "we are not now concerned with the right of the Senate to propound or the duty of the witness to answer specific questions, for as yet no questions have been propounded to him" (at 160). Yet the Court reviewed at length "the question whether it sufficiently appears that the purpose for which the witness's testimony was sought was to obtain information in aid of the legislative function" (at 176). In this review, the Court considered the authorization as a whole for the inquiry involved.

Nor does there appear any reason of policy for this Court to adopt so novel a limitation on its jurisdiction, especially when there is involved the liberties guaranteed by the Bill of Rights. The government asserts that witnesses should be required to obey a committee's processes even though its authorization "is ultimately held to be unconstitutional" since this "allows the business of Congress to proceed" (brief, pp. 26, 27). By the same logic,

persons must obey every unconstitutional law, and cannot attack the validity of a statute in a proceeding brought to punish them for violation of the statute. Yet it is in this posture that challenges to validity have been classically made. Moreover, we do not understand why it is "the business of Congress" to authorize investigations beyond its constitutional powers; and if that is the business of Congress, we do not understand why it must be allowed to proceed. The orderly dispatch of *proper* Congressional business is amply guaranteed by the circumstance that one who disobeys a valid summons of a valid Committee does so at his peril.

C. The Committee's Authorization Is Unconstitutional on Its Face and as Applied to Petitioner.

In our principal brief, we demonstrated that the function of the Committee, like the hypothetical committee we earlier described, is to censor expression. We pointed out that this function was inevitable under an authorization which required the Committee to classify ideas into categories labelled with invidious names. We pointed out that the legislative history of the Committee's authorization, its interpretation of its authority, and its administration of its authority, all indicated that this inevitable exercise of the censorship function was the intended role of the Committee. At all times, we showed, the Committee's acknowledged purpose has been to "expose" advocates of certain ideas *in order that they might suffer the consequences of adverse public sentiment.* We pointed out that the standards of censorship were in terms, by legislative history, and by administrative construction and practice, so meaningless as to enable the Committee to censor any ideas its members dislike.

Our analysis, in short, was a demonstration of the accuracy of Justice Edgerton's statement that "the case is as

if the enabling Act read 'the Committee shall expose unorthodox propaganda in order to restrain and punish it'." *Barsky v. United States*, 167 F. (2d) 241, 259, 260. On the basis of this analysis, we concluded that the Committee was unconstitutional.

The government's brief disputes not so much the validity of our analysis as our conclusion that the Committee's authorization, though of the nature demonstrated by the analysis, violates the Constitution. Indeed, the government virtually admits the validity of a large part of our analysis by conceding that one of the objects of the Committee is to publicize and "expose" "subversive and un-American activities" (government brief, pp. 36, 37). It should be remarked, in this connection, that the word "activities" is, in the text of the Committee's authorization, only "propaganda activities," a phrase which means, of course, only the "activities of propagating ideas."

1. The double-purpose argument.

The first of the government's arguments, presented as two different points, is that the Committee is valid "on its face" because it can, within its expressed authorization, make inquiries which are within the constitutional powers of Congress and which thus might assist Congress in exercising these powers. (Government brief, pp. 31-41 and 61-63.) Even if the Committee, it argues, may also make unconstitutional inquiries under its charter, nevertheless the legislation is saved by the constitutional possibilities, particularly in a case in which the petitioner "did not let the inquiry proceed far enough to permit the Committee to ask him any questions." *Id.* at 37.

Now it is indisputable that the Committee can make some inquiries which are within Congress' powers or which might discover information useful to the legislative process. The same is obviously true of any committee, no matter how fantastic or outrageous, which can be imag

ined. As we have earlier indicated, it is even apparent that the Committee can exercise a censorship which would be within the powers of Congress—as by censoring obscene matters passing in the mails or in interstate commerce. There ought to be added, however, the circumstance that the Committee's exercise of a general political censorship is not incidental or tangential to its exercise of functions in aid of proper legislative activities. On the contrary, the text of the Committee's charter, requiring as it does an invidious classification of ideas on a wholly undefined basis, the legislative debates on the Committee, the Committee's own constructions, and the Committee's practices, incorporated in its authority by the Congressional re-enactments—all these demonstrate beyond possibility of dispute that the chief function of the Committee, and indeed the only one ever articulated, is to censor expression by "exposing" the advocates of forbidden doctrine to the consequences of an adverse public sentiment.[1]

[1] Suppose a committee authorized to investigate, with the aid of compulsory process, whether all children under the age of six should be drowned. The most obvious legislative contribution of such a committee, by the government's tests, may be "negative in character," as by persuading Congress "that for practical or constitutional reasons no legislation on [the] subject should be enacted" (government's brief, p. 36). In addition, the committee might discover information useful to Congress in determining the size and character of federal appropriations for educational purposes (*cf. id.*, p. 33).

[2] The Government's own catalogue of the Committee's actual contributions to the legislative process, as distinguished from those which are imaginatively possible, is to the same effect. The "contributions" catalogued are, in the first place, remarkably few, both in the absolute and as relative to the tremendous general censorship exercised by the Committee. Secondly, the "legislative contributions" cited include measures which, on the government's own showing, are only incidental results of the Committee's investigations, thus supporting our thesis that at most the Committee's performance of legitimate functions is collateral to its general censorship, rather than the reverse. The only nexus between the Voorhis Act and the Committee is that the act was introduced by a member of the Special Committee—and this one who frequently objected to the Committee's practices (see, *e. g.*: Mr. Voorhis' minority report in H. R. Rep. No 2277, 77th Cong., 2d Sess., 1942). The nexus with the non-Communist affidavit provision of the Taft-Hartley Act is not that the Committee investigated to determine whether such a provision was desirable, but only that the provision largely rests on facts found by the Committee in the exercise of its regular censorship operations. It is curious that the government omits from its catalogue of the Committee's legislative accomplishments the rider which this Court held invalid as a

It is apparent that a general grant of political censorship powers cannot be saved because some permissible action may be, or has been, taken thereunder. If this were the case, the First Amendment would indeed be an impotent protection. This Court, recognizing that circumstance, has repeatedly held that legislation which on its face infringes protected freedoms of expression and assembly is wholly invalid even if it can also be applied in unprotected areas. *Thornhill v. Alabama*, 310 U. S. 88; *Winters v. New York*, 333 U. S. 507; *Stromberg v. California*, 283 U. S. 359; *Herndon v. Lowry*, 301 U. S. 242; *Cantwell v. Connecticut*, 310 U. S. 296; *Martin v. Struthers*, 319 U. S. 141; *Jamison v. Texas*, 318 U. S. 413; *Carlson v. California*, 310 U. S. 106; *Schneider v. Irvington*, 308 U. S. 147; *Lovell v. Griffin*, 303 U. S. 444; *DeJonge v. Oregon*, 299 U. S. 353.

The government contends that these cases are not in point on the grounds that they apply only to criminal statutes which restrain speech. This contention is preposterous in two respects.

First, there is here involved restraint by a criminal statute, namely Rev. Stats. sec. 102, which punishes disobedience to the Committee's processes. If the Committee's process on its face permits restraint of expression, then so, obviously, does the penalty for disobedience of that process. The restraint on expression flows not merely from the Committee's authority to summon witnesses, but also, and more importantly, from the fact that disobedience to its summons is punishable by the criminal statute under which petitioner was convicted. In short, Rev. Stats. sec. 102 cannot, under the cited decisions, be applied to punish disobedience to the Committee's summoning authority if that authority (and hence the penalty for disobedience)

bill of attainder in *United States v. Lovett*, 328 U. S. 303 (see at 308 for ascription of responsibility for the rider to the Committee). We think, too, that the Committee's censorship activities can hardly be validated by its promotion of legislation which, like the Mundt-Nixon bill and the Lovett rider, seeks only to implement the Committee's censorship activities or to create additional mechanisms for federal censorship.

is broad enough to restrain protected utterance. *Cf. Thomas v. Collins*, 323 U. S. 516; *M. Kraus & Bros. v. United States*, 327 U. S. 614. The criminal penalty is here involved more directly than in those decisions in which the stated rule was applied in an injunction suit seeking to invalidate a licensing of expression. *Cf. Hague v. CIO*, 307 U. S. 496; see *Thornhill v. Alabama*, *supra*, at 97.

Secondly, the distinction suggested by the government is without merit. The cases cited are concerned with the fact of restriction of freedom of speech and assembly, not with the form of the restriction. They govern *any* "regulations of the liberty of free discussion." *Thornhill's* case, at 98. Their logic is that the mere existence of a statute which is broad enough to restrain protected speech as well as unprotected activity is itself a restraint of protected speech. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of expression." *Id.* at 97. Such a broad statute all too "readily lends itself to harsh and discriminatory enforcement" which "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." *Id.* at 97, 98. Accordingly, these cases hold, a statute which operates in the area of speech must be narrowly drawn to cope with specific evils, and if it is not, it is wholly condemned. This logic is equally applicable to restraints on speech which, like the Committee, represent more subtle technics than criminal statutes directly prohibiting expression. If, therefore, Congress wishes to regulate speech by disclosure technics, it is obliged to define adequately what speech is to be regulated. If it merely wishes to investigate certain types of speech it may not frame its delegation of power so as to enable regulation of protected speech. If it does, the legislation is invalid as a whole.

Even if, *arguendo*, the Committee's authorization cannot be generally invalidated because it might be applied to

legitimate areas, nevertheless, petitioner's *conviction* must still be invalidated. For if it is true that he might have been called for a legitimate purpose, it is equally true, so long as the Committee's authorization covers both purposes, that he might have been called for an invalid purpose. And as long as this point is unresolved, petitioner cannot constitutionally be convicted. *Sinclair v. United States*, 279 U. S. 263, 296, 297; *Stromberg v. California*, 283 U. S. 359. In this case we need not even go so far, for not only is there a complete absence of proof that the Committee summoned petitioner in the exercise of a legitimate function of Congress, but on this record it must be taken that it was exercising an invalid function. As we have seen, the trial court refused to allow petitioner to prove that he was summoned only to be a victim of the Committee's illegal censorship activities. Our principal brief, pp. 48-53; see *post*, pp. 19-21. The government, therefore, misstates the situation when it says that "this case must be treated as if the Committee had intended — as, for all we know it did — to ask petitioner" about Soviet propaganda to overthrow the government by force, etc. (brief, p. 24). On this record, it must be taken that the Committee intended only to punish petitioner for his political beliefs and sought no information of any kind, either about the Soviet Union or anything else. (Further, as we state subsequently, if the Committee really wanted testimony from petitioner on that or any other subject, it would have asked him questions.)

2. The power of disclosure.

The government next argues that Congress may investigate for the sole purpose of informing the public "within the field of its constitutional jurisdiction" (brief, p. 37) or "at least so long as the matters to be disclosed are related to a substantive congressional power" (brief, p. 42).

We do not dispute this thesis, but it is here irrelevant. The question here is not whether Congress may investi-

gate to inform the public on matters within its constitutional jurisdiction or whether it may regulate by disclosure technics what it may constitutionally regulate otherwise. The Committee's function is to "expose" (i. e., to regulate by disclosure technics) what the Committee itself acknowledges to be beyond Congress' powers to regulate. The question here is whether Congress can by disclosure technics regulate speech and assembly which it cannot constitutionally regulate otherwise. The question is not the general propriety of disclosure, but whether Congress may so utilize disclosure and inquiry methods as to effectively restrain freedom of speech and assembly.

3. The First Amendment.

On this question the government asserts that the Committee's authorization "imposes no restraints. After testifying before the Committee a witness can believe, say and do the same things as he could do before" (brief, p. 47).

In its brief (pp. 42, 43), the government recognizes that the requiring of information may be, and often has been used as a type of regulation. Yet here it assumes (contrary to the Committee's own articulations of its function) that the requiring of information cannot possibly be a regulation of speech and assembly.

The fact is that the government's position is at once unrealistic and remarkably callous. Many persons, including the Hollywood writers, directors and producers who are *amici* in this case, have been deprived of their means of livelihood by the Committee's actions. These and many others have had their reputations ruined by the Committee. Still more persons are constrained daily to guard their speech and associations out of fear for the Committee. Yet all of these, we are told, have been subjected to no restraint.

It is true that a person can, notwithstanding the Committee, say what he pleases — but only at the risk that his life will be wrecked.

The Committee's victims (who include the public as a whole) know that the Committee restrains freedom of speech and assembly. The Committee knows it, and declares that such is its purpose. Both the majority and the minority in the *Josephson* and *Barsky* cases recognized the restraint. The President of the United States recognized it when he complained that the Committee's investigation violated the Bill of Rights (our principal brief, p. 28). The Attorney General recognized it when he said to the Committee: "The program of this Committee in bringing into the spotlight of publicity the activities of individuals and groups can render real service to the American people. *There is no more potent weapon even on the statute boks themselves.*" Hearings before the Subcommittee on Legislation of the Committee on Un-American Activities on H. R. 4442 and 4581, 80th Cong. 2d Sess., Feb. 5, 1948, emphasis added. (On a later occasion, after the Committee had attacked the Department of Justice, the Attorney General charged that its investigations were "contrary to our democratic system." See our principal brief, p. 29).

Apparently, the Solicitor General stands alone in his innocence. This innocence, be it noted, extends not only to the impact of the Committee, but to any possibility of oppressive use of inquisitorial powers. Yet the serious nature of such abuses has been frequently commented on by this Court. (See our principal brief, pp. 45, 46, including quotations therein from *Olmstead v. United States*, 277 U. S. 438, 478 and *Sinclair v. United States*, 279 U. S. 263, 292). It is, perhaps, the unawareness of this problem that causes the government to fail completely to refute or even mention our argument that the Committee's subpoena power violates the Fourth Amendment.

The government also asserts (brief, p. 49) that the First Amendment is not concerned with the "indirect consequence of public disclosure." We think that the First

Amendment is concerned with protecting freedom of speech and assembly from legislative infringement, whether the infrigement is direct or indirect, and whether it is effected by disclosure technics or otherwise. The fact is, of course, that the government's approach to the First Amendment in terms of "direct" or "indirect" infringement is misleading. The First Amendment protects certain interests from governmental invasion, and nothing in the Amendment limits its protection to apply only against certain types of invasion. Here the interests in expression and assembly are invaded by federal action which subjects speakers and listeners to being labelled as enemies of the state. This is not an "indirect" invasion; it is simply one kind of invasion, and one to which the First Amendment applies. Thus in *Illinois ex rel. McCollum v. Bd. of Education*, 333 U. S. 203, an interest included within the First Amendment was protected against invasion by disclosure of religious non-conformity, resulting in embarrassment and humiliation. Similarly, protection against invasion of First Amendment liberties by disclosure requirements was afforded in *Thomas v. Collins*, 323 U. S. 516 and *W. Va. Bd. of Education v. Barnette*, 319 U. S. 624.

Finally, the government argues that First Amendment rights are not absolute and must be balanced against other needs of the community. We assert that First Amendment rights are absolute, and if they are not, they are qualified not by any balance of interests but only by the concept of clear and present danger. So far as the government's brief is concerned, Justice Holmes' dissents might never have been written. Nor do we understand how in one breath the government can concede that "the First Amendment applies to all the powers of Congress" (its brief, p. 48), while in the next it can urge that the First Amendment does not limit "the power to compel testimony for public purposes" (*id.*, p. 50).

4. The indefiniteness of the Committee's authorization.

The demonstration in our principal brief of the indefiniteness of the Committee's authorization served the following main purposes: (a) it was proof that the function of the Committee was not to investigate in any *bona fide* sense, but to make invidious classifications of ideas with attendant censorship results; (b) it was proof that the censorship was unlimited, and hence was peculiarly destructive of the rights guaranteed by the First Amendment, and violated the Fourth, Ninth and Tenth Amendments; (c) it was proof that the Committee punished (by "exposure") for non-conformity with an undefined code, and hence violated the Fifth Amendment.

These points are in no way met by the government in its argument that the separation of powers doctrine does not apply to delegation of authority by Congress to one of its committees. We do not claim that this Committee or any other committee of Congress is invalid merely because its authority is delegated in broader terms than are permissible in a grant of authority to an executive agency. The vagueness of standards in the case of the Committee must be taken with the facts that it is a vagueness in classifying speech and relies on terms of opprobrium. Its pertinency, therefore, is first, to assist the analysis that the Committee's function is censorship, and secondly, to explain the extent and nature of the censorship. Our argument thus has no application to a case, in which, say, Congress simply delegates to a committee naked authority to investigate matters affecting interstate commerce. Such a delegation of authority would not be invalid on its face, although, of course, a particular inquiry undertaken by the commerce committee could be challenged as beyond the powers of Congress. Furthermore, the committee would be obliged to inform witnesses of the subject-matter of a pending inquiry. Such is, of course, the regular practice of legislative committees.

The government, however, also contends that the standards of the Committee are reasonably definite. Now we see what the government means by its numerous references to considering the Committee's charter "on its face." First of all, it means that one looks mostly at only one-third of the face, as by concentrating on the phrase "the principle of the form of government as guaranteed by our Constitution," while largely ignoring the alternative standards, "un-American" and "subversive." It also means that the wording of the authorization is not analyzed and that no regard is paid to the legislative history, which demonstrates that the House of Representatives knew that the standards were meaningless, or to the Committee's constructions and practices. "On its face," then, means to the government "out of context."

The government's explanation of the content of the standards still leaves us, at least, ignorant of their meaning. But if there may be some meaning which eludes us, we suggest that this Court is not entitled to assume it so long as neither the legislature nor the Committee has ever recognized it.

5. Conclusion.

The government's argument and the somewhat different reasoning of the majorities in the *Barsky* and *Josephson* cases are, perhaps, the most convincing evidence yet offered of the invalidity of the Committee on Un-American Activities. What are we to say of a Committee whose constitutionality is justifiable not on the basis of reality but only by flights of fancy? Which is sustainable only because of what it might do, without serious reference to what it does do? Whose standards are understood and defined only by brief-writers and never by its creators or itself? And whose tremendous, and boasted of, impact on speech and assembly must be wholly ignored?

Finally, what are we to say of a treatment of the First Amendment which makes it not a firm bulwark against

restraint of expression, but simply a technical barrier to be avoided, like tax statutes, by skillful maneuvering?

Never in its history has this Court had before it a more powerful repression of speech and assembly, and thus of our democracy itself, than that represented by the Committee on Un-American Activities. If this repression can survive judicial review, it is hard to see that the First Amendment retains much function.

Against this hard fact, the government and the *Barsky* and *Josephson* majorities plead only, in essence, the importance of permitting Congress to investigate. They envisage all types of threats to our security by fifth-column propaganda. But we have not disputed the right or power of Congress to investigate, under appropriately framed legislation, propaganda which endangers our security. The Committee on Un-American Activities is invalid because Congress is through it regulating protected speech by use of investigative and disclosure technics. Invalidation of the Committee will reassert the recognized limitations on Congress' power to regulate speech and assembly. It will in no way interfere with Congress' powers of investigation.

II. THE PETITIONER WAS NOT SUMMONED TO TESTIFY ON A MATTER OF INQUIRY COMMITTED TO THE COMMITTEE.

The government urges that there was sufficient evidence that petitioner was summoned to testify on a matter under inquiry before the Committee (brief, p. 86), but it points only to the Resolution itself and to the subpoena. The Resolution, however, is only the authorization to the Committee. It constitutes no evidence that the Committee was in this case acting pursuant to its authorization.[3] The

[3] Nor, obviously, is such evidence supplied by Mr. Thomas' bald recital that on certain dates the Committee was "functioning pursuant to the Resolution" (R. 13). Such evidence would have to be supplied by testimony on the subject-matter of the inquiry to which petitioner was summoned.

formal recital in the subpoena is evidence of nothing but the form of the subpoena. In essence, therefore, the government is arguing not that there was sufficient evidence to support a finding that petitioner was summoned to testify on a matter under inquiry properly before the Committee, but that it was not necessary to introduce any such evidence. For if one relies solely on the Resolution itself and the issuance of a formal subpoena, one is simply adopting the doctrine of the trial court that it must be presumed that the Committee was acting within the terms of its authorization when it issued the subpoena.

As we showed in our main brief (pp. 48-51), however, the statute, the indictment, and *Sinclair v. United States*, 279 U. S. 263, all demonstrate that no such presumption is permissible, and that the government must offer affirmative evidence to prove that petitioner was summoned to testify on a matter of inquiry committed to the Committee.

The government's discussion of the *Sinclair* case (brief pp. 88-90) is completely confused, and it is difficult to determine precisely what point the government is attempting to make in the course of it. It is sufficient to note that in that case, the Court considered at some length the evidence to show that the defendant there had been summond on a matter under inquiry before the committee and that the particular question asked of the defendant was pertinent to the inquiry. Nowhere did the Court in that opinion say or indicate, as intimated by the government (brief, p. 89), that reference to the underlying Resolution itself was sufficient proof that the defendant had been summoned on a matter under inquiry. On the contrary, the Court discussed in some detail the nature of the inquiry before the Committee and the relation thereto of the testimony sought from the defendant, and it expressly found that the government had met its burden of proof.

If the prosecution had here sought to follow the reasoning of the *Sinclair* case, it would have offered testimony to

show the precise nature of the inquiry before the Committee, the evidence sought from the petitioner, and the relation between the two.[4] But in the words of Justice Prettyman, quoted in our principal brief at p. 49, "This record does not show, and we do not yet know, what it was that the Committee wanted appellant to testify about."

The record does show, however, that the petitioner offered to prove that he was not summoned on a matter of inquiry committed to the Committee, but was denied this opportunity by the trial court. (See our principal brief, pp. 49-50). The government admits, verbally at least, that the prosecution had to prove that petitioner was summoned on such a matter. Accordingly, even if the government had proved this fact, certainly the defense had to be allowed to contradict the government's evidence by introducing countervailing evidence.

The government argues, however, that such countervailing evidence is not admissible because it necessarily concerns only the motives of Committee members. But it is no more true that the countervailing evidence necessarily concerns motives than that the evidence it seeks to negative necessarily concerns motives. So here petitioner was seeking to introduce evidence of "objective facts" (government's brief, p. 90), and there is no basis for the government to assume the contrary by asserting that "the only way petitioner could establish such ulterior purposes would be to interrogate the various Committee members as to the reason why each individual voted to subpoena petitioner." On the contrary, petitioner intended not to investigate the reasons of individual Committee members but, instead, to prove the expressed, formal action of the Committee as a Committee—as by showing that the Committee met and voted to have petitioner subpoenaed and arrested in order to humiliate and harass him for his political beliefs and

[4] Under the *Sinclair* case also (see at 295), petitioner should have been permitted, as we contend below, to introduce evidence that the investigation was "avowedly not in aid of legislation."

to prevent his departure to Germany, and that the Committee as a Committee had no interest in obtaining from petitioner any information whatsoever. So in *McGrain v. Daugherty*, 273 U. S. 135, 176, the Court reviewed "the purpose for which the witness's testimony was sought."

To accept the formulation of the government simply prevents any defendant from ever proving that he was summoned for a non-legislative purpose; for the government argues that any such a showing goes only to "motives" and that "motives" are not subject to scrutiny. Accordingly, the gist of the government's position is, like that of the trial court, that abuse of authority by a Congressional committee is not subject to judicial review. The difficulty with this position, once it is revealed, is that it conflicts with all the decisions of this Court on the subject and with the legislative history of the contempt statute.

It is apparent from the present record, even in the absence of the proof which the trial court erroneously excluded, that the Committee as such desired no information from petitioner. Can it be seriously urged that if it wished information from the petitioner, it would have troubled to have the Attorney General take him into custody and haul him into the Committee room, only to have him immediately hauled out because he had asked for three minutes? Can it be seriously suggested that, on the one hand, the evidence which the Committee sought from this petitioner was so essential to the functioning of government that the petitioner must now spend one year in jail and pay $1000 fine for withholding it, but, on the other, the evidence was not so important as to be worth three minutes of the Committee's time? We do not urge these considerations in any attempt to be facetious, or to suggest that a Congressional committee must suffer what it may consider to be an impertinence, but only to demonstrate that no committee interested in obtaining information would have behaved as this Committee did. If it was information the Committee sought, without excusing impertinence, it surely

would have voted to cite the petitioner for contempt, thus assuring punishment for any impertinence, and then have endured for three minutes the statements of the petitioner, following which it would have obtained his testimony. The Committee, however, like the Queen of Hearts, said only, "Take him away—Off with his head."[5] And this conduct was rational only because the Committee had already achieved its sole purpose with the witness—which was to humiliate and harass him and find a basis for criminal punishment, not to obtain testimony.

III. THE ILLEGAL CONDUCT OF THE COMMITTEE AND PETITIONER'S ATTEMPT TO MAKE A LEGAL OBJECTION THERETO.

A. In our principal brief we argued that petitioner cannot validly be punished for refusing to testify under the illegal and ignominous circumstances, instigated by the Committee, of his production at the hearing. The government apparently concedes that the due process clause prohibits punishment wherever there is presented "a basic absence of fair play or . . . an arbitrary or improvident use of power" (its brief, pp. 98, 99). It asserts, however, that in this case there was no such an abuse of power by the Committee. We are content to rest on the record for the resolution of this difference.

B. We also argued that the petitioner had a right under the circumstances to make an objection to being sworn

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[5] See testimony of Chairman Thomas at R. 52-53:

Q. Well, what did you do after Mrs. King [Counsel for petitioner] said, "May I be heard?" A. Well, prior to that the committee had voted to cite this man for contempt. We were dismissing the witness. Miss King said nothing until we had decided to dismiss the witness.

Q. What did you answer when Mrs. King said "May I be heard, Mr. Chairman?" A. "Take the witness out."

Q. Did you recognize Mrs. King after she had made that request to be heard? A. It was too late then—too late.

One may seriously ask, at this point: Too late for what?

before taking the oath, and that, whether he had such a right or not, he was not guilty of a "willful default" under the contempt statute, if all he tried to do at the hearing was to make such an objection and if he was willing, once the objection was overruled, to take the oath and testify.

We complained, therefore, that it was error for the trial court to exclude evidence relevant to whether petitioner was merely trying to make such an objection, and to refuse to instruct the jury, as requested, that it must acquit if it found that such was the case.

The government disregards the wholesale exclusions of evidence that we complained of in this respect (our principal brief, p. 54, n. 6), and reduces the point only to the exclusion of one piece of this evidence — namely, the contents of the three-minute statement. It also ignores the refusal of the trial court to give the requested instructions.

Now it is clear that the evidence offered and excluded was all relevant to the defense that petitioner had merely tried to make an objection, and that it was evidence which might have persuaded the jury that such was the case. Indeed, evidence of the contents of the alleged objection (*i.e.*, of the contents of the three-minute statement) was relevant evidence that the making of an objection was intended. The government's contention to the contrary is manifestly unrealistic,* but even if its contention were sound it would not justify the exclusion of other evidence which was relevant. It is obvious that relevant evidence cannot be excluded merely because some evidence on the subject has been allowed, so long as the further evidence offered is not burdensomely repetitive. The evidence here excluded was not repetitive at all.

* It should be added that the government's characterization of the three-minute statement as an "intended attack upon the political motivation of the Committee" (its brief, p. 95) is unwarranted and disingenuously stated. This statement (described at R. 134, 135) was an appropriate objection to the Committee's illegal treatment of petitioner and to its right to require his testimony.

Furthermore, so long as there had been introduced relevant evidence on the subject, as the government insists, the issue should have been submitted to the jury under appropriate instructions. These instructions the trial court denied (instead, it gave instructions which eliminated the issue — our principal brief, pp. 85 ff.); yet the government, significantly enough, is wholly silent as to this palpable error.

C. As we have indicated, it is not necessary for a reversal of the conviction that petitioner had a constitutional right to make an objection before being sworn. Even without such a right, his attempt to object would not be a willful default, and evidence on the subject should therefore have been allowed and submitted to the jury. In addition, however, we assert that petitioner did have a constitutional right to object, both because of the circumstances involved and also because witnesses generally have such a right. This being so, he could not validly be punished for asserting or trying to assert the right, evidence was admissible as to whether such was the case, and appropriate jury instructions were required.

The government apparently concedes that the Constitution does confer on a witness the right to make objections, but it confines that right only to questions. Thus it states (brief, p. 97): "The Constitution certainly does not require that a witness be allowed to make an objection before he is sworn. As long as the objection is allowed to be made before any unlawful question is required to be answered, the witness' rights are amply protected." But if a witness' objection is not to any specific question but to being sworn, to being asked any question, and to the proceeding as a whole, how can his rights be "amply protected" if he can assert them only after the damage complained of is done? Even Representative Thomas grasped this simple truth — that an objection to being sworn must be made befor the oath is taken (R. 49).

The government also urges that petitioner did not make clear to the Committee that he wished to make an objection. We do not understand why such a circumstance would deprive him of his right, if he had intended in fact to exercise it. But leaving this point aside, the fact is that the jury might have found, if appropriately instructed as requested, that petitioner did indicate that such would be the nature of his statement when he said that he was a political prisoner and that "a political prisoner has to do nothing" (R. 46, 47). It was not his fault if the Committee cut him off from further explanation. The most that can be said is that his language was obscure or inartistic. But petitioner is an alien and a layman, and the Committee practice (as we attempted to show by evidence which the trial court rejected) was not to permit objections to be made by counsel for a witness.

The government's discussion of the facts in this part of its argument thus ignores the portions of the colloquy at the hearing which indicated petitioner's objection. It may be added that its reliance on petitioner's statement, "I am not going to take the stand," fails to take into account petitioner's testimony (R. 129) that he was interrupted before he could complete the sentence by adding "before I make a few remarks." The jury, of course, could have disbelieved this testimony, but they were never given a chance, under the trial court's charge, to either believe or disbelieve it.

The sum of the government's contention, then, is that petitioner must be punished, not for willfully obstructing the legislative process, but for failing to make himself un-

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[7] Remarkably enough, although the trial court excluded this evidence as irrelevant, yet it, the prosecutor, and the appellate court all considered that the presence of counsel raised a legitimate inference that petitioner did not want to make an objection because his counsel was there to make it for him! R. 75, 165, 239. The government now draws the same inference (its brief, p. 97), while, like the appellate court, refusing to discuss our contention that the exclusion of this evidence was erroneous.

derstood under difficult circumstances by an impatient Committee.

This also answers the government's second argument with respect to whether a "willful default" was committed (its brief, p. 95). Whether or not the Committee ordered petitioner to be sworn "regardless" of his desire to object — an hypothesis inconsistent with the suggestion that the Committee never appreciated his desire — nevertheless, the jury might have found under proper instructions, and especially if the excluded evidence had been admitted, that petitioner did not intend to disregard even the "order regardless," but was still attempting to explain, in the face of a misunderstanding of his purpose, that he merely wished to state an objection. In other words, the jury might have found not that petitioner was "willfully obdurate," but that he had simply been cut off while trying to explain his position.

IV. THE AFFIDAVIT OF BIAS AND PREJUDICE.

A. The Affidavit Was Substantively Sufficient.

In *Berger v. United States*, 255 U. S. 22, 33, 34, the test laid down for the sufficiency of an affidavit of bias and prejudice was whether the reasons assigned "give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment."

While, perforce, accepting the *Berger* case as authoritative, the government's argument in fact applies not a test of "fair support" of a "bent of mind," but rather a test of whether the facts alleged prove bias beyond doubt. Thus it repeatedly states that the allegations of the affidavit do not "*show*" personal prejudice (its brief, pp. 71, 72, 74, 75) and they do "not, of course, *prove* bias" (*id.*, p. 73).

The government also relies on judicial practices of voluntary disqualification, and asserts that this Court must assume that all members of the judiciary have "intellec-

tual discipline" (*id.*, pp. 72, 77). But if reliance is to be on voluntary disqualification, it is impossible to understand why Congress enacted a compulsory disqualification statute. Moreover, the statute was designed to preserve the confidence of the public in our judiciary not the self-confidence of the judiciary itself. The test is not, therefore, what this Court may think or assume, but what the lay affiant, who presumably is not cognizant with the niceties of voluntary disqualification, may reasonably believe. *Cf. Hurd v. Letts*, 152 F. (2d) 121, 122, that the test is whether "a sane and reasonable mind might fairly infer personal bias or prejudice on the part of the judge." We assert that a layman may reasonably believe that one who has investigated a case may not be a wholly unbiased judge in a prosecution growing out of the same investigation. Judges themselves may think otherwise, but, as Justice Prettyman pointed out in his dissent, that is irrelevant. In fact, Congress itself agrees with our hypothetical layman, as appears from section 5(c) of the Administrative Procedure Act (see our principal brief, p. 63).

The government reads the affidavit as not *necessarily* alleging that Justice Holtzoff actually participated in investigating the petitioner or even that he *necessarily* knew about the investigation. This reading is, we insist, technical, formalistic, and contrary to the manifest meaning of the affidavit, which is that Justice Holtzoff participated in investigations of petitioner and other Communists. The question is not what the allegations "necesarily" mean, but, in the light of the statutory policy, what they reasonably do mean. As we have pointed out, Justice Holtzoff himself and the majority and minority below unhesitatingly read the affidavit as charging actual participation. But even if the government is right in its quibbling over the meaning of the affidavit's phraseology, its conclusion is erroneous. At most the government's interpretation is that petitioner's belief was based on an inference rather than on a personal, actual knowledge of the

full ultimate facts. But most human beliefs, including those on which people act on matters of utmost personal importance, are based on inferences, not on actual knowledge of the facts inferred. The *Berger* case itself expressly held (at 35) that the facts need not be personally known but can be alleged on information and belief. If the belief was based on inference, the only inquiry, if any, is whether the inference is reasonable, and such is surely the case here. Finally, we suggest to the government that one who believes something *must have* happened (its brief, p. 73) also believes it *did* happen.

The government's explanation of the difference between "personal" and "non-personal" bias is to us wholly obscure, nor, admittedly, is it relevant to those allegations of the affidavit which deal with Justice Holtzoff's connection with investigating the petitioner. It is plain, however, that the affidavit, if fairly read, alleges a hatred of individuals who are Communists, and not merely a dislike of their ideology. It thus comes within the holding in the *Berger* case as to these allegations as well.

B. The Affidavit Was Timely.

The government asserts that the filing of the affidavit was not timely for the following reasons:

(1) That although the identity of the trial judge was learned only on May 20, counsel for petitioner were delinquent in reserving decision to May 23, pending investigation and consideration in the meantime, because the trial had originally been set for May 26 (brief, p. 78).

(2) That although no decision had been made to file the affidavit, it nevertheless was incumbent on counsel to inform the trial court that they were thinking about possibly doing so (brief, p. 79).

(3) While chief trial counsel was unavailable because of the death of his brother, other counsel were obliged

to ignore his absence and proceed without benefit of his participation (brief, p. 79);

(4) That petitioner was "not warranted in waiting until a judge has decided certain issues against him before determining whether to seek to disqualify the judge" (brief, p. 80). . .

The first three of these propositions largely answer themselves. The original decision that two days might be necessary for checking and determining whether or not to file was obviously not unreasonable. The suggestion that although no decision had been made to file, counsel should nevertheless inform the trial court of the possibility can only be characterized as fantastic. No trial counsel who considered the interests of his client would ever adopt such a procedure, which might needlessly antagonize the trial judge. The further suggestion that other counsel should ignore the necessary absence of the chief trial counsel is equally unrealistic and contrary to the mores of the bar.

The government's last proposition is a generality whose accuracy we do not dispute, but it is not applicable here. It is clear that on May 23, when Justice Holtzoff ruled on the motions, counsel had not decided, and had not had adequate opportunity to decide, whether or not, to file the affidavit. There is no basis for the government's invidious suggestion that counsel were withholding decision until they saw how Justice Holtzoff would rule. Nor is the government correct in urging that insufficient time to investigate and consider somehow becomes sufficient because a motion is pending. Such an argument is irrational on its face and is also contrary to the decided cases: *Morris v. United States*, 26 F. (2d) 444; *Barskff v. Holtzoff*, App. D. C., April Term, 1947, Misc. 126.

The government also obliquely suggests that the affidavit was filed for dilatory purposes. This intimation too is wholly without foundation, and the record demonstrates

that the contrary was true. When the affidavit was filed on May 29, the trial had been set for June 4, six days later. As Justice Prettyman pointed out, if the trial judge had acted on it promptly, there was no reason why another judge could not have been assigned by the date of trial. This was as apparent to counsel for the petitioner as it was to Justice Prettyman. They had no reason to expect that if Justice Holtzoff disqualified himself, it would have delayed the trial for even a single day. By this we do not mean to concede that a defendant may not file an affidavit, if as a result of such filing a delay may be caused. It appears to us that the policy of the disqualification statute must be respected by the judiciary even if, as a result, a trial is delayed for a day or even a week. But in the present case, it is clear that there was no reason to anticipate a delay, and the introduction of the subject of delay only causes confusion. The Government's position is thus fully in accord with the policy of many of the lower courts to nullify the statute by interpretation. Frank, *Disqualification of Judges*, 56 Yale L. J. 605, 629.

V. THE PETITIONER DID NOT RECEIVE A FAIR TRIAL.

The government argues that the petitioner did receive a fair trial, but in the course of its discussion it ignores the chief points made in our brief and misstates others. Thus it ignores completely, as did the appellate court below, the trial judge's inconsistent rulings on evidence (see our principal brief, pp. 84-85), his violation of Rule 30 of the Rules of Criminal Procedure (our brief, pp. 86-87), and his direction of a verdict of guilty (our brief, pp. 85-86).

The government also states that "since the reprimands [of trial counsel] were administered outside of the hearing of the jury, any impression of hostility on the part

of the judge toward petitioner or his counsel was carefully avoided" (brief, p. 103). This statement is utterly and inexplicably false. Only one of the numerous reprimands (R. 51, 52) was administered out of the presence of the jury. Both before and after the one reprimand which was made outside the presence of the jury, and in which the trial judge recognized that reprimands in the jury's presence were prejudicial, the trial judge reprimanded counsel *in the presence of the jury* on at least eight separate occasions, as fully set out in our principal brief, pp. 72-81. These rebukes were neither deserved nor temperately couched.

The government also asserts (brief, p. 100) that we were inaccurate in stating that the trial judge's refusal to entertain offers of proof was an illustration that "he exacted retribution for fancied slights." But the trial judge himself expressly put his refusal to entertain the offer of proof on the ground that counsel could not "change back and forth" "in the light of the statement made by defense counsel" (see pp. 79-80 of our principal brief). The government further justifies the trial judge's refusal to entertain offers of proof on the trial judge's additional ground that he had previously ruled out an entire class of evidence. Further, says the government, the trial judge showed patience in the face of persistent efforts of counsel to introduce evidence that the trial judge had already ruled was irrelevant. As an example, the government says that although the trial court had ruled that reliance on advice of counsel was not a defense to a charge of willful default, trial counsel repeatedly attempted to introduce such evidence (government brief, pp. 100-101). Nothing in the record supports these statements.

What counsel did try to introduce into evidence, as to which the trial court even refused to listen to offers of proof, was evidence that under the Committee's practice counsel would not be permitted to make a legal objection, and that therefore counsel had advised petitioner that he

himself, should present the legal objection before the committee. Not only is this evidence completely removed from the proposition that advice of counsel eliminates willfulness, but it is also clear that if the trial judge had been willing to listen to the offer of proof he might have considered that the evidence so offered was relevant. Thus government counsel below considered it important to stress to the jury that petitioner had counsel present to make any legal objection (R. 165), the appellate court below considered it "important to note that appellant was accompanied to the hearing by his legal counsel" (R. 239), the government considers the presence of counsel a factor which it is important to recite in its brief (p. 97), and indeed even the trial court considered the presence of counsel at the hearing to be of significance (R. 75). In all these instances the presence of counsel was considered to be significant against the petitioner as indicating that if the making of an objection had been sincerely intended his counsel would have made it. It must, therefore, have been relevant for petitioner to explain away this damaging inference by showing that his counsel would not have been permitted to make a legal objection and that she had so informed petitioner and instructed him to make his own legal objection. It is even conceivable that if the trial judge had permitted counsel to indicate that such was the nature of the evidence offered, he might have admitted it. Perhaps the moral is that a trial judge does not always know what counsel wishes to say so that he can reject a contention without even hearing it.[5] Likewise, it is hardly appropriate for the government to argue that the trial judge was correct in refusing to permit the making of offers of proof because the evidence which petitioner sought to introduce was irrelevant. The government is no more entitled to practice the arts of clairvoy-

[5] The trial judge showed similar clairvoyance in rejecting counsel's arguments for judgment of acquittal without benefit of hearing them (R. 152-155).

ance than was the trial judge, and we have shown that in fact the evidence we sought to introduce was relevant by any standard and was not on a subject-matter evidence of which had already been excluded.

Petitioner argued in his brief (pp. 81-84) that it was error for the trial judge to take over the prosecution and continually interpose his own objections to the conduct of the trial by the defense. The government offers the irrelevant answer that although the trial judge made adverse rulings to the petitioner, it also made adverse rulings to the prosecution (brief, p. 104). But we made no contention that the number of adverse rulings by themselves showed hostility. It is typical of the government's brief that it ignores the contentions made by petitioner, and refutes contentions not made.

Finally, the government says: "Although the trial may not have attained the ideal of judicial decorum in which friction between counsel and court is wholly absent, no substantial prejudice to the petitioner is perceptible," because "there was no substantial conflict in the evidence as to the essential points that were required to be submitted to the jury" (brief, p. 104).

This argument has point only if there were nothing for the jury to decide. But juries do not merely resolve conflicts in evidence, they must resolve conflicts in interpreting even uncontradicted evidence. In this case, the jury had to decide whether the evidence showed beyond a reasonable doubt that petitioner had refused to be sworn, as distinguished from merely attempting to make a legal objection, and whether in any event this refusal was willful. The evidence was not all so one-sided and unequivocal that this issue was not to be submitted to the jury, and only the jury could decide, and this only by a process of inference, whether any refusal was "willful."[9] Indeed,

[9] See R. 153, where the trial judge himself said that "the question of wilfulness is a question of fact for the jury."

the government, in urging that it was not error to exclude some evidence bearing on the subject, argued that the trial court did admit some (its brief, p. 94). In making its decision on this point, the jury was undoubtedly influenced by the hostility of the trial judge, manifested in their presence. Moreover, under our system of jurisprudence, no matter how one-sided the evidence, a defendant is entitled to have a jury decide his guilt or innocence thereon impartially and uninfluenced by the judge's hostility. In addition, it is not the jury which sentences, but the judge.

In view of the popular excitement against Communists generally and petitioner specifically, this case, if ever there was one, required the trial judge to seek to realize the "ideal of judicial decorum." It is plain that he attempted nothing of the sort, and the government concedes that this ideal was not in fact reached.

Finally, it is ironic that the government attempts to save the court's conduct on the grounds that the jury issue was narrow, since it was the court's own errors in refusing appropriate instructions and excluding relevant evidence which narrowed the jury's function. Perhaps the government means that the court's conduct in prejudicing the jury was of no consequence because all possible damage was accomplished by his directing a verdict of guilty (see our principal brief, pp. 85, ff.). But then, at least, petitioner is entitled to a reversal for the direction. The government, however, adopts the discreet course of completely ignoring the issue of the directed verdict.

VI. THE TRIAL COURT ERRONEOUSLY INTERPRETED "WILLFULLY" IN THE STATUTE.

The government urges upon this Court the argument that the two clauses of the statute, the first of which contains the word "willfully," and the second of which omits

it, have precisely the same meaning. This concept is a difficult one to comprehend, since it concludes that an intentional use of contrasting phraseology in adjacent clauses reveals a purpose to give those clauses the same meaning. The argument is not only illogical, but it ignores completely the statement made with regard to this statute in *United States v. Murdock*, 290 U. S. 389, 397: "Two distinct offenses are described in the disjunctive, and in only one of them [the one presently involved] is willfulness an element."

Respectfully submitted,

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